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INFO AMEMBASSY PARIS
USMISSION USUN NEW YORK

UNCLAS GENEVA 000025

L/HRR, IO/SHA, DRL

E.O. 12958: N/A
TAGS: UNHR, UNGA, PHUM
SUBJECT: FORCED DISAPPEARANCES: THIRD FORMAL NEGOTIATING
SESSION

1. (U) Summary. During the Third Formal Session of the Working Group to Elaborate a draft convention to punish and prohibit forced disappearances, held in Geneva from October 4-8, 2004, the Working Group, chaired by the French Permanent Representative, devoted the majority of the session to an initial and thorough discussion of the proposed treaty monitoring body, its structure and functions, found in Part II of the draft text. The final two days were devoted to a discussion of several articles in Part I that contain contentious issues, namely, the definition of enforced disappearance, criminalization as an autonomous offense, complicity, defense of superior orders, and jurisdiction, in particular "found in" quasi-universal jurisdiction. The Fourth formal session of the Working Group, scheduled to take place from January 31-February 11, 2005, will pick up with Article 11 (the extradite or prosecute provisions). Although the chair would like to conclude the negotiations during the fourth session and produce a final text for adoption by the CHR and by the UNGA in 2005, many delegations believe that the work remaining to be done will not accommodate such an ambitious schedule. End Summary.

2. (U) Treaty Monitoring Body. The first three days of the session were devoted to discussion of the proposed treaty monitoring body, its structure and mandate. The group considered whether the proposed instrument should be styled as an Optional Protocol to the International Covenant on

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Civil and Political Rights (ICCPR), ~~Using the Human Rights Committee (or a subcommittee of that Committee) as the monitoring body.~~ **UNCLASSIFIED** This optional approach appears to be supported by the vast majority of States in the room (including the United States). Alternatively, the group considered whether the proposed instrument should be an independent treaty that creates a new monitoring body, a position supported by a number of Latin states and all NGOs representing families of the disappeared. Both the longtime UN expert on involuntary disappearances Manfred Nowak and the current Chair of the Human Rights Committee, Mr. Abdelfattah Amor, who punctuated the week-long session with scholarly and thoughtful contributions, support an Optional Protocol using the existing Human Rights committee. The two experts underscored that the Human Rights Committee already has jurisdiction over disappearances, which are a violation of several of the rights granted under the ICCPR, and also jurisdiction over individual communications alleging disappearances with respect to States Parties to the First Optional Protocol to the ICCPR (to which the U.S. is not a party). Although the overwhelming majority of States support structuring this instrument as an Optional Protocol to ICCPR, the Chair seems reluctant to let go of his vision for a treaty and new monitoring body.

3. (U) Treaty Body Functions. The Working Group spent much time discussing the potential mandate of the monitoring body. The chair,s draft text envisions several monitoring body functions including:

- a. Examining initial State reports;
- b. An urgent action procedure that would also entail a possible site visit, if consented to by the State Party in question. However, this procedure (as currently worded) would also afford nearly unfettered discretion to the monitoring body in determining the modalities of the visit once consent is granted. The chair envisions this element of the mandate to be a core function for the monitoring body;
- c. An individual communication mechanism that, as currently drafted, is an awkward melding of the traditional treaty-based individual communications procedure and the CHR,s 1503 procedure;
- d. A contemplated referral procedure to the Secretary General in cases where widespread or systematic enforced disappearance is practiced within or by a State, a function that would be unprecedented in a human rights treaty; and
- e. An annual report prepared by the monitoring body which could include a section that would "name and shame" States that are uncooperative with the treaty body.

4. (U) Discussion also focused on additional important

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issues, including:

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- a. the proposal supported by some delegations to rework the individual communications procedure to render it consistent with current treaty body law and practice, including making it optional;
- b. the merits and demerits of confidentiality of complaints and of "naming and shaming";
- c. the desirability of providing for follow-up state reports at the request of the treaty body;
- d. the potential duplication between the proposed urgent action mechanisms of the treaty monitoring body and the existing CHR special procedure (i.e., the working group on involuntary disappearances, created in 1980);
- e. the absence of a state-to-state, or inter se, complaints

mechanism;

- f. the need to clarify the predicates for a monitoring body site visit;
- g. the need to make approved site visits subject to agreed modalities between the State and the treaty body;
and
- h. the reasons underlying the serious reservations of many States regarding referral to the Secretary General.

5. (U) Despite the chair's ambitious desire for a speedy adoption of this text, additional conceptual refinement and additional redrafting of Part II of the draft text remains to be done. Moreover, if this instrument is ultimately styled as an Optional Protocol to the ICCPR and thus entails use of the Human Rights Committee, Part II could be radically simplified along the lines of the procedural articles of the Second Optional Protocol to the ICCPR (articles 3-5), with the possible addition of an urgent action procedure and a site visit upon state consent. For this reason, several States urged that the working group decide the question of nature of the instrument before discussing the details of Part II. However, the Chair deferred decision-making on this issue, apparently in order to allow time for broader support to develop for adoption of a new, autonomous instrument.

6. (U) Substantive Articles (Article 1-11). During the last two days, the Working Group also discussed several (but not all) of the first eleven articles (on a somewhat hurried basis due to lack of time). Those provisions included:
- a. PP2 and article 2bis on crimes against humanity;
 - b. pp4 on the right to know;
 - c. article 1 on the definition of a forced disappearance and on state action;
 - d. article 2 on criminalization as an autonomous offense;

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- e. article 3 on complicity and on elimination of defense of superior orders;
- f. article 4 on mitigating circumstances;
- g. article 5 on statute of limitations;
- h. article 9 on jurisdiction; and
- i. article 11 on "found in" (quasi-universal) jurisdiction.

(Note: We continue to be seriously concerned that such a provision could expose U.S. officials to criminal prosecution for alleged involvement in military or law enforcement activities that arguably fall within the overbroad definition of enforced disappearances, should such officials travel to the territory of a State party. However, there is near-universal support for a quasi-universal jurisdiction provision).

7. (U) In execution of the written guidance for the delegation, which incorporated comments of several agencies including DOD/OSD, DOJ/OIA, DHS, and HHS/ACF, and which was cleared in full by NSC, DOD, and several offices within the State Department, the delegation made interventions that addressed the structure and authorities of the treaty monitoring body and each of the substantive issues noted in paragraphs 1-6 above. The U.S. delegation underscored that the overbroad and vague definition was not only flawed in and of itself but also that it rendered more problematic a number of other articles in the instrument, including elimination of a defense of superior orders and the jurisdictional provisions. The delegation also continued to object to provisions that would require or imply recognition of a right to know, eliminate a defense of superior orders, or require quasi-universal jurisdiction.

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